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No. 87-1100

In The
Supreme Court of the United States
October Term, 1987

BOB MOZERT, *et al.*,

Petitioners,

vs.

HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*,

Respondents.

BRIEF OF THE COMMISSIONER OF EDUCATION OF TENNESSEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether exposure to ideas offensive to petitioners' religious beliefs in the public school reading curriculum constitutes an impermissible burden under the free exercise clause of the First Amendment?

2. Whether the State's compelling interest in education can be achieved if it is required to exempt students who elect to attend public school from the reading curriculum?

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BRIEF OF THE COMMISSIONER OF EDUCATION OF TENNESSEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The respondent, Charles E. Smith,[1] Commissioner of Education of the State of Tennessee, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 827 F.2d 1058 (6th Cir. 1987).

[1] Pursuant to Rule 40.3 of the Supreme Court Rules, Charles E. Smith has been substituted for Robert L. McElrath as Commissioner of Education for the State of Tennessee as a result of Dr. McElrath's resignation and Dr. Smith's appointment effective January 17, 1987.

STATEMENT OF THE CASE

The Commissioner adopts the statement of facts as presented in the opinion of the Court of Appeals, below, along with the statement of facts presented by the respondents, Hawkins County Public Schools, *et al.*, in their brief in opposition to the petition for writ of certiorari. Taken together, these statements fully and fairly summarize the facts in this case. *See Mozert v. Hawkins County Public Schools*, 827 F.2d at 1059-63; *Brief of Hawkins County Public Schools in Opposition to Petition for Writ of Certiorari*, pp. 1-10.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE QUESTIONS PRESENTED BY THE PETITIONERS REGARDING THEIR FREE EXERCISE OF RELIGION IN THE PUBLIC SCHOOL CONTEXT HAVE ALREADY BEEN RESOLVED BY THIS COURT AND OTHER LOWER COURTS IN FAVOR OF THE RESPONDENTS AND, ACCORDINGLY, DO NOT MERIT REVIEW BY THIS COURT.

The fact that the judgment of the Court of Appeals, below, is correct is sufficient in and of itself for this Court to deny the petition for writ of certiorari.[2] There are two

[2] Where the decision of a lower court is correctly decided based on the prior precedent of this Court, then the questions raised in a petition for writ of certiorari do not constitute "important question[s] of federal law which [have] not been, but should be, settled by this Court . . . .". Rule 17.1(c), Supreme Court Rules. Of course, the fact that a particular case has received national press attention has no bearing on whether that case merits review by this Court.

grounds[3] upon which the correctness of the judgment of the Court of Appeals may rest: (1) Exposure to ideas which are offensive to the petitioners' religious beliefs as part of the public school reading curriculum is not a burden on their free exercise of religion; (2) The State's compelling interest in public education through a uniform integrated curriculum of which reading is an essential part cannot be achieved by permitting the petitioners to be excused on religious grounds from the public school reading program.[4]

As for the first ground, this Court has never held that where the State exposes a person to ideas which offend his or her religious beliefs, such an exposure constitutes a burden on that person's free exercise of religion. Such a view is totally unrealistic and contrary to our pluralistic society. Moreover, it inhibits the primary goals of public education to expose children to the diverse world about which they are to enter. It is a well established principle

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[3] Rule 22.1 of the Supreme Court Rules provides that respondents in opposing a petition for writ of certiorari may raise "any matter or ground why the cause should not be reviewed by this Court." Although Chief Judge Pierce Lively in the opinion of the Court of Appeals, below, did not reach the question of whether the State's compelling interest in public education could be accomplished under a partial home school reading program, that issue was addressed in favor of the respondents by Judge Cornelia Kennedy in her concurring opinion. *Mozert v. Hawkins County Public Schools*, 827 F.2d at 1070.

[4] The petitioners argue that permitting their children to participate in a partial home school option by learning to read at home instead of through the public school reading program would "be able to meet the state's objectives . . ." *Petitioners' Brief in Support of Petition for Writ of Certiorari*, p. 17. Such an argument is incorrect because it ignores the catastrophic effects such an alternative would have on the public education system. *See, infra*, pp. 6-12.

through the decisions of this Court that in order to burden a person's free exercise of religion, government action must either: (1) coerce a person to affirm a belief repugnant to their religion; or (2) interfere either directly or indirectly with a religious practice of a person. *See, Cantwell v. Connecticut,* 310 U.S. 296 at 303 (1940) (The free exercise clause embraces two concepts—the freedom to believe and the freedom to act); *Torcaso v. Watkins,* 367 U.S. 488 (1961) (The Maryland Constitution requirement of a declared belief in the existence of God as a test for office compels a person to affirm a belief repugnant to their religious beliefs); *Sherbert v. Verner,* 374 U.S. 398 (1963) (Denial of unemployment compensation benefits based on a person's refusal to alter her religious practices of not working on Saturday is an indirect burden on that religious practice.) The petitioners' exposure by the State to ideas which are offensive to the religious beliefs of the petitioners through the public school reading program neither requires the petitioners to affirm any particular belief repugnant to their religion nor interferes with any religious practice.

None of the cases cited by the petitioners hold that exposure to religiously offensive ideas constitutes a burden on a person's free exercise of religion. *See, West Virginia State Board of Education v. Barnette,* 319 U.S. 624 at 631 (1943) (This case concerned the fact that compelling students to declare a belief by requiring them to salute the flag is a burden. No claim was made by the plaintiffs that their children being exposed to other children saluting the flag constituted a burden.); *Sherbert v. Verner, supra,* (The plaintiff claimed that the denial of unemployment compensation benefits for failure to work on Saturday is

a burden upon her religious practice of not working on Saturday. She did not claim that being exposed to the view that others in the work force had no religious scruples against working on Saturday was a burden.); *Thomas v. Review Board,* 450 U.S. 707 (1981) (The plaintiff asserted that the denial of unemployment compensation for failure to work in an armaments factory likewise constitutes a burden on the practice of not engaging in acts which support war; however, no claim was made by the plaintiff that being exposed to government publications designed to encourage employees to produce armaments is a burden.)[5]

The petitioners also cite two recent establishment clause decisions of this Court which bear no relation to the question of whether exposure to religiously offensive ideas constitutes a burden under the free exercise clause. *See, Wallace v. Jaffree,* 472 U.S. 38 (1985) (The Alabama voluntary prayer statute was violative of the establishment clause as being religiously motivated without any secular purpose as opposed to any indication that any children's free exercise rights were burdened in that instance.); *Edwards v. Aguillard,* 107 S.Ct. 2573 (1987) (The Louisiana Creationism Act was also void of any secular purpose with no indication that there was any burden on the free exercise rights of any school children.)

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[5] In the opinion of the Court of Appeals, below, Chief Judge Lively stated that the "requirement that students read the assigned materials and attend classes, in the absence of a showing that this participation entailed affirmation or denial of their religious beliefs or performance or non-performance of their religious exercise or practice does not place an unconstitutional burden on the students' free exercise of religion." *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1065.

There are also a number of additional lower court decisions which support the correctness of Chief Judge Lively's determination that exposure to ideas offensive to the religious beliefs of petitioners does not constitute a burden on those beliefs. *See Davis v. Page,* 385 F.Supp. 395 (D.N.H. 1974) (The fact that a health class is "distasteful" to the religious beliefs of the plaintiffs is insufficient to invoke the free exercise clause.); *Williams v. Board of Education,* 388 F.Supp. 93 (S.D. W.Va. 1975) (The First Amendment does not guarantee that nothing about religion will be taught in the schools nor that nothing offensive to any religion will be taught in schools.); *Fellowship Baptist Church v. Benton,* 620 F.Supp. 308 (S.D. Iowa 1985) (Education requirement does not deny free exercise where the individual is free to disagree with the contents). *See also Wilson v. Block,* 708 F.2d 735, 741 (D.C. Cir. 1983) (Many government actions may "offend religious believers, but unless such actions penalize faith they do not burden religion.")

Although this Court has never been presented with this precise factual situation, prior case law of this Court provides ample basis for the conclusion that the answer to the question of whether exposure constitutes a burden is well settled in favor of the respondents. Exposure to religiously offensive ideas does not compel a person to affirm a belief repugnant to his or her own, nor does it directly or indirectly interfere with a person's religious practices. Moreover, decisions of lower courts with facts very similar to the present confirm this conclusion. On that basis, this Court should deny review.

The second ground which supports the correctness of the judgment of the Court of Appeals, below, is the State's

compelling interest in public education relative to the petitioners' religious liberties. Even the petitioners concede that the State has a compelling interest in public education.[6] However, the petitioners misperceived the State's interest in public education by equating that interest to the State's interest in compulsory education for all students in Tennessee. *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1201. It is true that the State of Tennessee has a substantial interest in mandating that every child in Tennessee receive a minimum level of education by compelling children to attend either public, private, church or home school from ages seven to sixteen. Tenn. Code Ann. § 49-6-3001(c)(1) (1987). However, this interest only goes as far as to require minimal functional literacy for children who attend private, church or home schools over which the State has virtually no control. The only state involvement in such programs is through occasional testing and other minimum requirements to assure that a child is receiving a basic education. Tenn. Code Ann. §§ 49-6-3001(c)(2) and 3050 (1987).

On the other hand, the State of Tennessee has made a decision to establish its own program for the education of

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[6] Throughout this litigation, the petitioners have conceded that the State has a compelling interest in public education. *See Mozert v. Hawkins County Public Schools,* 647 F.Supp. 1194 at 1200 (E.D. Tenn. 1987) (No party disputes that the State's interest in education is compelling, overriding, of the highest order, and especially important.) Moreover, the questions presented in the petition for writ of certiorari do not challenge the existence of a compelling state interest in public education, but rather argue that there is a less restrictive alternative to accomplishing that interest.

its future citizens. This Court has indicated that "[e]ducation is perhaps the most important function of state and local government . . . [and that] it is a principal interest in awakening the child to cultural values . . . and in helping him adjust normally to his environment." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Likewise, this Court has more recently stated that "public education must prepare pupils for citizenship in the republic . . ." *Bethel School District v. Frazier*, 106 S.Ct. 3159, 3164 (1986). *See also Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979) (The objectives of public education are "the inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.")

In Tennessee, the State has identified a number of goals for its students in public schools well above the minimum goal of literacy required of children in private, church and home schools. Some of these objectives include: (1) preparing each student to be a useful, thinking and discerning citizen; (2) developing good citizenship in Tennessee's young people; (3) enabling students to think critically and arrive at intelligent decisions by exposure to controversial topics;[7] and (4) helping students to identify their own values, not for the purpose of changing

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[7] At one point in this litigation, it was the petitioners' position that reading involves only the recognition of words with the objective of "good English and grammar". *Mozert v. Hawkins County Public Schools*, 827 F.2d at 1062. But, critical reading which is an essential element in enabling students to think critically and arrive at intelligent decisions is accomplished by exposing children to diverse and controversial subjects and problems. The discussion of these issues in the classroom transcends the Holt reading series and is an essential element of not only the reading program but the entire educational curriculum. *Id.* at 1072.

those values but to understand that values may differ among individuals. There is no doubt that the State of Tennessee has a compelling interest in achieving these goals. As Judge Kennedy stated in her concurring opinion in the Court of Appeals, below: "Teaching students about complex and controversial social and moral issues is just as essential for preparing public school students for citizenship and self government as inculcating in the students the habits of manners of civility." *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1071. Thus, the law is settled that the State has a compelling interest in exposing children in public schools to controversial social and moral issues as an integral part of the learning process.

The petitioners claim that the Holt texts contain a number of themes offensive to their religious beliefs such as "occultism, secular humanism, evolution, passivism, feminism and disobedience to parents." *Petitioners' Brief in Support of Petition for Writ of Certiorari,* pp. 3-4. In addition, the petitioners argue that the State can achieve its compelling interest in public education by permitting their children to be excused from the public school reading program and learn reading at home instead. *Id.* at 17. This position ignores both the reality of the facts in this case and precedent of this Court relative to public education. If the State is required to shield the plaintiffs from being exposed to certain controversial ideas in the Holt texts which they find offensive to their beliefs, it will be unable to achieve its goals in public education relative to these children, i.e., enabling students to think critically and arrive at intelligent decisions by exposure to controversial topics.

More importantly, the petitioners' proposed arrangement creates a wholly untenable situation in the public school classroom. If a child has objections to certain themes as being religiously offensive in a reading text, the teacher will be placed in the impossible dilemma of insuring that this child is not exposed to these same themes in other subjects.[8] Such a situation places the teacher in the Hobson's choice of either: (1) removing the objecting child from the classroom when any materials offensive to that child's religious beliefs are discussed, or (2) prohibiting any discussion of these objectionable themes totally from the entire classroom day. Members of this Court have rejected both of these choices in looking at whether the State's compelling interest in public education can still be achieved if these alternatives are implemented.

In Justice Brennan's concurrence in *School District of Abbington v. Schempp,* 374 U.S. at 292, it was noted that "the exclusion of a pupil [from the classroom based upon religious beliefs] puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious beliefs." Clearly excluding a child from a public school classroom based upon religious beliefs would create religious divisiveness in the public schools. In "no activity of the state is it more important to keep out divisive forces than in our schools." *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 231 (1948) (Frankfurter, J. concurring). Not only would religious divisiveness occur in

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[8] Some of the petitioners objected to their children not only being required to read the Holt texts, but also objected to their children even being in the same classroom when these texts were read aloud. *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1072, Fn. 3.

such a situation, but there would also be a significant material disruption of the educational process.[9]

As for prohibiting the discussion of themes which are offensive to the petitioners' religious beliefs, Justice Jackson in his concurring opinion in *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. at 235 stated the following:

> Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representatives has as good a right as the plaintiff to demand the Court to compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant lawsuits.

Precedent of this Court refutes the plaintiffs' contention that permitting their children to be excused from the

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[9] The difficulties encountered in public schools would be enormous. The State of Tennessee requires the use of an integrated curriculum in which state objectives in one subject may be taught in another subject. For example, a reading group may learn certain science objectives about fossils through a story in the reading program. Permitting students to be taught reading at home while participating in other subjects would create serious problems with how to proceed with that child's educational progress. *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1071-72. Moreover, by having no control over the reading program of the petitioners, a teacher would be unsure as to whether the petitioners had mastered certain reading skills which were essential in other subject areas for the child's education. This inability to comprehend other subject areas would cause additional disruption in the education of other children by slowing the process for the entire classroom. *Id.*

reading program and taught reading at home is a viable alternative which still achieves the State's compelling interest in public education. As Judge Kennedy in her concurring opinion in the Court of Appeals, below, stated: "If the school district were required to accommodate exceptions and permit other students to opt out of the reading program and other core courses with materials others found objectionable, this would result in a public school system impossible to administer." *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1072-73.

Based upon the correctness of the judgment of the Court of Appeals, below, on either the burden or compelling interest questions, the Commissioner would urge this Court to deny the petition for writ of certiorari.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS, BELOW, AND OTHER CIRCUITS OR THE PRIOR DECISIONS OF THIS COURT.

The petitioners have failed to cite any decision of another circuit court of appeals which is in conflict with the Sixth Circuit decision in this case. Moreover, the opinion below is consistent with the reasoning of other circuits and this Court in resolution of controversies between public schools and religious believers.

In *Smith v. Board of School Commissioners of Mobile County,* 827 F.2d 684 (1987), the Court of Appeals for the Eleventh Circuit enumerated certain goals in public education very similar to those stated by Judge Kennedy in her concurring opinion including the teaching of values such as "independent thought, tolerance of diverse views,

self respect, maturity, self reliance, and logical decision making." *Id.* at 692. Textbook content was recognized as reflective of those secular ideals which were deemed appropriate for teaching to public school students. The Eleventh Circuit further concluded that the objecting parents and students who raised establishment clause objections to the secular content of the public school text books had failed to establish any free exercise claim even though the district court found that the students' religious beliefs would likely be affected by the content of the books. *Id.* at 692, fn. 12.

Likewise, the Court of Appeals for the Fourth Circuit has rejected arguments that the free exercise of religion is inhibited by public school use of textbooks which may be religiously offensive to some individuals, *Williams v. Board of Education,* 388 F.Supp. 93 (S.D. W.Va.), *aff'd,* 530 F.2d 972 (4th Cir. 1975) and that exposure of students to other students who do not share the same religious beliefs interferes with the free exercise of religion, *Duro v. District Attorney, Second Judicial District of North Carolina,* 712 F.2d 96 (4th Cir. 1983)

In *Florey v. Sioux Falls School District,* 619 F.2d 1311 (8th Cir. 1980) *cert. denied* 449 U.S. 987 (1980), which was cited by the petitioners as a conflicting decision, the Court of Appeals for the Eighth Circuit acknowledged that matters of cultural significance, including matters having additional religious significance, are appropriate for inclusion in the public school curriculum. The primary complaint of the *Florey* plaintiffs with regard to a school district policy on secular/religious holidays was that it authorized "something more than secular study" in violation

of the establishment clause. *Id.* at 1316. Thus, the Eighth Circuit did not address any exposure issue such as is presented by petitioners in the present case. The court's brief discussion of free exercise does not imply recognition of any right not to be exposed to information contained in a secular curriculum.[10]

In their attempt to portray a circuit conflict, the petitioners are misplaced in relying on a concurring opinion in *Grove v. Mead School District, No. 353,* 753 F.2d 1528 (9th Cir. 1985), *cert. denied* 106 S.Ct. 85 (1986). The majority opinions in *Grove* and *Mozert* address different species of the First Amendment issues, the Ninth Circuit not having been presented with any clear free exercise claim. Thus, the opportunity for a conflict is absent. The *Grove* concurring opinion is, in fact, in accord with the *Mozert* opinion as explained by Chief Judge Lively in the opinion below. *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1068.

Similarly misplaced is the petitioners' reliance upon decisions of lower federal courts,[11] and state courts in an effort to contrive a conflict among the circuit courts of appeal. First, such lower court cases are not indicative

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[10] To the contrary, in discussing accommodation of religious objections, the court in *Florey* states that it would be "literally impossible to develop a public school curriculum that did not in some way affect the religious or nonreligious sensibilities of some of the students or their parents" and that schools "need not and should not sacrifice the quality of the students' education" in order to avoid conflicts. *Florey v. Sioux Falls School District,* 619 F.2d at 1317.

[11] In particular, the petitioners rely on *Moody v. Cronin,* 484 F.Supp. 270 (C.D. Ill. 1979); *Wright v. Houston Independent School District,* 366 F.Supp. 1208 (S.D. Tex. 1972).

of a conflict among appellate courts which would warrant this Court's examination. Additionally, the petitioners misapprehend the holdings of such cases as establishing a constitutional right of students to "opt out" of learning the core academic curriculum while simultaneously remaining in the public schools. While it has not been uncommon for students to be excused from matters peripheral to the core academic curriculum, the cases cited establish no precedent for vesting public school students with a constitutional right to delete the reading curriculum from their public school experience.

The opinion of the Sixth Circuit in *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972) is in accord with its holding in the instant case. The petitioners' suggestion for a rehearing *en banc* afforded the Sixth Circuit an opportunity to correct any inconsistencies between the opinion below and established First Amendment law. However, the suggestion of rehearing was unamimously rejected by the full panel. *Petitioners' Brief in Support of Petition for Writ of Certiorari*, p. 1a (appendix).

The requirement that public school students be exposed to ideas which might offend their religious beliefs through reading a basal reader series chosen by school authorities does not constitute coercion under the free exercise clause. This conclusion by the Court of Appeals, below, is consistent with this Court's holdings in *Barnette*, *Sherbert*, and *Thomas*. *See* arguments, *supra*, pp. 4-5. As for *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court of Appeals correctly distinguished *Yoder* in that total removal of their children from the "worldly influence" of public education, which was sought by Amish parents in that case, has always been available to petitioners through

the private school or home school options. *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1067. Finally, it should be noted that this Court refused to consider a claim by certain parents in Virginia that the compulsory attendance laws of that state violated their free exercise rights on the grounds that the curriculum in both private and public schools was contrary to their religion. *Snider v. Virginia,* 106 S.Ct. 2911 (1986) (dismissed for want of a substantial federal question).

Since there is no conflict between the decision of the Court of Appeals, below, and prior decisions of this Court and other Courts of Appeal, the petition for writ of certiorari should be denied.

CONCLUSION

Based upon the foregoing authorities and analyses, the respondent, Commissioner Charles E. Smith, respectfully requests this Court to deny the petition for writ of certiorari.

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